No. 87-562

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, et al.,

Respondents,

—and—

NATIONAL WESTMINSTER BANK PLC, et ano,

Intervenors-Respondents.

BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Richard F. Ziegler
Counsel of Record
Robert L. Tortoriello
Lawrence B. Friedman
Roger M. Klein
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004
(212) 344-0600

Attorneys for Intervenors-Respondents National Westminster Bank PLC and NatWest Holdings, Inc.

QUESTION PRESENTED

Did the Court of Appeals interpret the Glass-Steagall Act reasonably and consistently with legislative intent and the Court's precedents in ruling that the Federal Reserve Board, which has primary responsibility for implementing the Act, properly concluded that the provision of both securities brokerage and investment advisory services by a single bank affiliate, exclusively as agent for its customers and not as principal, does not constitute the "public sale" of securities proscribed by Section 20 of the Act, particularly in view of the Court's ruling that the term "public sale" in the Act has no application to securities transactions where the bank affiliate acts exclusively as agent for its customers?

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Intervenors-respondents, National Westminster Bank PLC and NatWest Holdings, Inc. (collectively "NatWest"), respectfully submit this brief in opposition to the petition for a Writ of Certiorari by the Securities Industry Association ("SIA") to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 7, 1987.

STATEMENT OF THE CASE

NatWest adopts the Statement of the Case set forth in the SIA's petition except for those respects, discussed below, in which it misstates and mischaracterizes the nature and content of NatWest's application to the Board of Governors of the Federal Reserve System (the "Federal Reserve Board" or "Board") pursuant to Section 4(c)(8) of the Bank Holding Company Act of 1956 (the "BHC Act"), the Board's order approving NatWest's application and the decision of the Court of Appeals affirming that order.[1]

A. NatWest's Application

Notwithstanding the SIA's repeated misstatements to the contrary, NatWest's application for permission to engage in brokerage and investment advisory activities through a new subsidiary, County Securities Corporation ("CSC"), did not propose or contemplate that, in the SIA's words, CSC "would engage in the business of promoting the purchase and sale of particular securities. . . ." Petition at 3.[2] Under NatWest's proposal, CSC provides securities trade execution and investment advisory services to institutional customers, earning its income solely from the commissions it charges for the securi-

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1 Pursuant to Rule 28.1 of this Court, NatWest states that the parent, subsidiaries and affiliates of NatWest having outstanding publicly-held securities issued within the United States are National Westminster Bank PLC and NatWest Capital Corporation. The inclusion of subsidiaries and affiliates with outstanding publicly-held securities issued outside the United States would substantially increase this list.

2 *See also* Petition at i (CSC will "promote the purchase and sale of particular securities to the public"); at 4 (CSC will be engaged in "the promotion and sale of particular securities"). The SIA relied upon similar misstatements concerning CSC's business plan in its brief to the court below. *See* Brief for Petitioner SIA (Oct. 8, 1986) ("SIA Appellate Br.") at 4, 12-13, 15.

ties transactions it executes for customers.[3] Critically, CSC receives commissions on transactions it brokers whether or not those transactions have anything to do with CSC's buy or sell recommendations. Indeed, as the court below noted, since CSC in the normal course makes such recommendations on only a small fraction of the thousands of securities traded nationwide, CSC can hope to operate profitably only if the vast majority of transactions that it brokers involve securities as to which CSC has made no investment recommendation at all. *Securities Industry Association v. Board of Governors*, 821 F.2d 810, 817 (D.C. Cir. 1987), reprinted in the Petition at 15a.

Accordingly, CSC's profits depend *exclusively* on the volume of shares it trades for its customers and *not* on the purchase or sale of any particular securities. There is no basis whatsoever for the SIA's claim that CSC will engage in the business of "promoting the purchase and sale of particular securities. . . ." The SIA's repeated misstatements on this point create a "straw-man" which it thereafter seeks to knock down; they do not accurately reflect the record before the Board or the court below.

B. The Board's Order

The Petition also mischaracterizes the portion of the Board's order analyzing and approving NatWest's application under the BHC Act and concluding that such approval was consistent with the provisions of the Glass-Steagall Act. In order to erect yet a second straw-man, the SIA suggests that the Board rushed to a short-cut judgment that, since the Court has permitted bank affiliates to provide separately each of the two components of CSC's proposed activity (investment advice and securities execution services), the combination of those activi-

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3 Although CSC generally will not charge a separate fee for investment advice, it may provide investment advice or execution services independently and for separate fees. *See National Westminster Bank PLC*, 72 Fed. Res. Bull. 584, 584-85 (1986), reprinted in the Petition at 22a-23a.

ties therefore was allowed. Petition at 4.[4] To the contrary, the Board carefully analyzed its own and the Court's prior rulings, and did not rely primarily upon the permissibility of the twin components of CSC's services if they were provided by two separate entities, in reaching the conclusion that CSC's activity does not constitute the "public sale" of securities proscribed by Section 20 of the Glass-Steagall Act as that term has been construed both by the Board in prior orders and by the Court, most recently in *Securities Industry Association v. Board of Governors*, 468 U.S. 207 (1984) ("*Schwab*"). *See* 72 Fed. Res. Bull. at 592, Petition at 40a-43a. The Board also found, again after careful analysis, that its conclusion was consistent with the purposes and legislative history of the Act, as well as with banking and securities brokerage practices after the enactment of Glass-Steagall, and that CSC's proposed activity did not involve any of the "subtle hazards" against which the Act was aimed. 72 Fed. Res. Bull. at 593-95, Petition at 44a-51a.

C. The Decision Below

Finally, the Petition similarly misrepresents the affirmance of the Board's order by stating that the court below: (a) also relied principally on the fact that the Court has separately upheld each of the components of CSC's proposed activity; and (b) conceded that the activity "fell within the literal scope of the term 'public sale' in Section 20 . . . ." Petition at 5. The principal basis for the opinion below was that CSC's proposed activity does not constitute the "public sale" of securities as that term was defined by the Court in *Schwab* and its antecedents. 821 F.2d at 813-15, Petition at 6a-11a. The court below also found that the proposed activity is similar to the fiduciary functions traditionally performed by banks since the 1930s. *Id.* The court never held, observed or conceded that the proposed activity fell within the "literal scope" of Section 20. To the contrary, it expressly rejected the SIA's reliance

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4 The SIA similarly misdescribed the Board's order in its brief to the court below. *See* SIA Appellate Br. at 6 and 10 n. 13.

upon a dictionary definition of "public sale" on the ground that it was not supported by the Court's precedent. 821 F.2d at 815, Petition at 11a.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

The Board's order and its affirmance by the court below neither clash with the purposes of the Glass-Steagall Act nor, to use the SIA's hyperbolic rhetoric, "significantly chang[e] the structure of the nation's financial services industry." Petition at 6.

First, the Act's legislative history, as it has been discussed in the Court's decisions and the decision below, indicates that Congress did not intend that Glass-Steagall erect a complete barrier between banking organizations and all types of securities activities. Both the legislative history and the very text of the Act indicate that Congress wished only to bar banks and their affiliates from acting as *principals* in securities transactions—buying or selling securities for their own account—and from underwriting or distributing newly-issued securities. It is these investment banking activities that place a bank's assets at risk, and it was commercial banks' participation in these activities that Congress perceived as having contributed to the national economic crisis to which the Act responded. Hence, it is these activities that the Act proscribes. *See generally* Perkins, *The Divorce Of Commercial And Investment Banking: A History*, 88 Banking L.J. 483, 490-505 (1971). *See also Schwab*, 468 U.S. at 219-20.[5]

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5 In its order approving NatWest's application, the Board discussed at length the SIA's misinterpretation of the legislative history of the Glass-Steagall Act. *See* 72 Fed. Res. Bull. at 592, Petition at 43a-44a.

Indeed, far from prohibiting banks and their affiliates from engaging in securities brokerage activities as agent for customers, the Act in Section 16 expressly permits banks to engage in "purchasing and selling . . . securities and stock without recourse, solely upon the order, and for the account of, customers . . . ." 12 U.S.C. § 24 Seventh. The Court noted in *Schwab* that this "permissive phrase" "accurately describes securities brokerage." 468 U.S. at 219 n. 20. It also accurately describes CSC's operation.

Furthermore, as the Board and the court below expressly found, and contrary to the SIA's statements, Petition at 7, the history of banking practices and securities brokerage after the enactment of Glass-Steagall reveals ample precedent for CSC's activity. The Board noted that, immediately after the enactment of Glass-Steagall, prominent private banks continued to provide full-service brokerage that included the rendering of investment advice and securities transaction execution services. 72 Fed. Res. Bull. at 593, Petition at 46a. The court below noted that, even today, banks traditionally act as executors, trustees or managing agents of funds committed to their custody and bank trust departments manage employee benefits trusts, institutional and corporate agency accounts and personal trust and agency accounts. In those capacities, banks not only regularly provide investment advice and buy and sell securities for their customers, but also, as was the case with the bank whose activities were upheld against Glass-Steagall attack in *Board of Governors v. Investment Company Institute*, 450 U.S. 46 (1981) ("*ICI II*"), can exercise discretionary authority with respect to their customers' accounts. *See* 821 F.2d at 814-15, Petition at 10a.

CSC, however, may execute a trade only upon the request of a customer. Accordingly, rather than representing an unprecedented extension of bank or bank affiliate securities-related activities, CSC's business plan falls well within the ambit of the activities in which banks and bank affiliates have engaged since the day the Glass-Steagall Act became law.

Nor is the Board's order or the decision below inconsistent with any administrative order involving the Glass-Steagall Act or with the decision of any federal court. The Board has also acted consistently with its own rulemaking pursuant to the Act and, in particular, its implementation of Section 32 of the Act, which prohibits interlocking managements between banks and certain brokers. The SIA's incantation of the text of the Board's Regulation R implementing Section 32 and its leap to the conclusion that this rule must be interpreted to place brokers providing execution services and investment advice within Section 32's prohibitions, *see* Petition at 7, cannot overcome the fact that, as the Board's order emphasizes, the Board has historically relied upon Regulation R to allow numerous interlocks between member banks and full-service brokerage firms. As the Board also noted, this interpretation of Section 32 was at least implicitly affirmed by the Court in *Board or Governors v. Agnew*, 329 U.S. 441 (1947). *See* 72 Fed. Res. Bull. at 593-94, Petition at 44a-46a.[6]

Finally, the fact that the Board's order and the activity in which CSC has been permitted to engage are not matters of national significance that merit the Court's review is amply demonstrated by other recent Glass-Steagall Act cases in which the Court has denied *certiorari* petitions from the affirmance of regulatory orders, two of which were also brought by the SIA. *See Investment Company Institute v. Clarke*, 793 F.2d

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6 As it did below, the SIA disingenuously states that, in two other instances, the Board ruled that Glass-Steagall prohibits a broker from providing investment advice. Although the SIA suggests that in *United Jersey Banks*, 69 Fed. Res. Bull. 565 (1983), the Board approved a bank holding company's acquisition of a discount broker "precisely because that broker would not provide investment advice," Petition at 8 n. 14, United Jersey's application to the Board did not propose to have the broker give investment advice. Thus, the permissibility of such activity was not before the Board. *See* 821 F.2d at 819-20, Petition at 19a-20a. Nor was the permissibility of combined investment advice and brokerage services before the Board in *Sovran Financial Corp.*, 72 Fed. Res. Bull. 146 (1986), the second Board order upon which the SIA relies. Petition at 8 n. 14. *See* 821 F.2d at 819, Petition at 19a.

220 (9th Cir.), *cert denied*, 107 S. Ct. 422 (1986) (upholding rulings by Comptroller of Currency approving national banks' proposals to establish collective investment funds for individual retirement account trust assets and the distribution of registered securities representing interests therein); *Securities Industry Association v. Board of Governors*, 807 F.2d 1052 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 3228 (1987) (upholding Board order permitting state-chartered commercial bank to place as agent commercial paper issued by third party); *Investment Company Institute and Securities Industry Association v. FDIC*, 815 F.2d 1540 (D.C. Cir. 1987), *cert. denied*, 56 U.S.L.W. 3244 (Oct. 6, 1987) (upholding FDIC regulations respecting the establishment of securities affiliates by FDIC-insured non-Federal Reserve System member banks). Each of these cases involved bank or bank affiliate activities that were contested at least as vigorously by representatives of the securities industry as is the activity in which CSC proposed to engage. Moreover, in the former two cases, the Court denied *certiorari* petitions after the appellate courts had reversed district court decisions upholding the securities industry's challenges. Here, by contrast, the Board and the Court of Appeals joined in upholding NatWest's application over the SIA's challenge.

II.

THE DECISION BELOW FAITHFULLY FOLLOWS THE COURT'S DECISIONS CONSTRUING THE GLASS-STEAGALL ACT

The Board's order and its affirmance below faithfully follow an unbroken line of authority construing the Glass-Steagall Act. None of the SIA's four arguments in support of a writ demonstrates that the Board or the court below departed from any of the Court's precedents in any respect, or that the Board's order or the decision below raises any substantial questions of federal law.

1. The Board's order and the decision below are entirely consistent with the Court's rulings, most recently in *Schwab*, defining the contours of Section 20's prohibition against the "public sale" of securities by bank affiliates.[7] In affirming the Board's finding—and rejecting the SIA's contentions—that the conduct of retail securities brokerage activities by a bank holding company subsidiary did not violate Section 20 of the Act, the Court in *Schwab* construed the term "public sale" as follows:

> "Public sale" is used in conjunction with the terms "issue," "flotation," "underwriting," and "distribution" of securities. . . . An underwriter normally acts as principal whereas a broker executes orders for the purchase or sale of securities solely as agent. Under the "familiar principle of statutory construction that words grouped in a list should be given related meaning," *Third National Bank v. Impac, Ltd.*, 432 U.S. 312, 322 (1977) (footnote omitted), *the term "public sale" in § 20 should be read to refer to the underwriting activity described by the terms that surround it*. . . .

Schwab, 468 U.S. at 217-18 (emphasis supplied). The Court then held that the brokerage at issue did not fall within the term "public sale" because "[a]n underwriter normally acts as principal whereas a broker executes orders for the purchase or sale of securities solely as agent." 468 U.S. at 217-18.

The principal distinction between the brokerage activity at issue in *Schwab* and the activity in which CSC engages is that *Schwab* involved a "discount" brokerage company, which

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7 Section 20 provides in pertinent part:

> [N]o [Federal Reserve System member bank] shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

12 U.S.C. § 377.

charges reduced commission rates to the general public and does not provide investment research and advice. CSC's business plan calls for CSC to provide investment research and advice to its customers, a traditional service of both securities brokers and commercial banks and a service which, like "discount" brokerage, does not involve a role for CSC as principal in any transaction.[8] The SIA seizes upon this distinction (the only distinction available in order to avoid *Schwab* as collateral estoppel) in support of its argument that CSC's proposed activity will involve the "public sale" of securities that Section 20 prohibits. *See* Petition at 10-12.

The Court has also held that the provision of investment advice by bank affiliates is perfectly permissible under the Act. *See ICI II*, 450 U.S. at 64. The fundamental defect in the SIA's argument, therefore, is that it nowhere explains how CSC's provision of investment advice to its customers, an activity that passes muster under *ICI II*, transforms CSC's execution of securities transactions for those customers, as their agent and on their order, into an activity akin to the "underwriting" barred by *Schwab*. The SIA cannot make that explanation because, as the Board found, it is indisputable that the full-service brokerage at issue here, like the discount brokerage approved in *Schwab*, involves *neither* transactions for the broker's own account (*i.e.*, the "secondary market") *nor* the underwriting or distribution of an issuer's securities:

> [I]n the Board's view, the addition of investment advice to securities execution services as proposed by CSC would not render the combined activity the "public sale" of securities. In providing investment advice in connection with the execution of securities transactions, CSC would act solely as agent for its customers and would not act as a principal (*i.e.*, with its own funds) in buying and selling securities. CSC would not, like many securities firms,

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8 A second distinction between the broker at issue in *Schwab* and CSC is that CSC will limit its customers to institutional investors, and will not do business with the general public. *See* 72 Fed. Res. Bull. at 584 & n. 1, Petition at 21a-22a & n. 1.

> make a market in securities with its own funds. Nor would CSC offer securities to the public as agent for the issuer of securities. *Thus, CSC's full-service brokerage services would not involve any of the factors used by the Supreme Court in describing the term public sale in Section 20.*

72 Fed. Res. Bull. at 592, Petition at 42a (emphasis supplied). Accordingly, relying principally upon *Schwab*, the Board properly concluded that CSC's proposed activity does not constitute the "public sale" of securities.

The court below also relied principally upon the Court's construction of Section 20 in *Schwab* to conclude that the Board's order was reasonable. *See* 821 F.2d at 813-14, Petition at 7a-9a. The court emphasized that the addition of investment advice to brokerage activities does not give rise to any of the activities which the Court in *Schwab* described as traditionally associated with underwriting—CSC will have no relationship with the issuer of the securities it brokers as agent for the customer. It will not purchase the issuer's securities for sale to the public, but instead will execute orders for the purchase or sale of securities solely as agent, nor will CSC act as agent for the issuer as a "best efforts" underwriter. *See* 821 F.2d at 814, Petition at 9a.

Moreover, contrary to the SIA's unjustified assertion, Petition at 10, the court below did not purport to restrict the reach of "public sale" solely to activities on behalf of issuers, but also recognized that the concept of "public sale" could encompass trading as principal in secondary markets. 821 F.2d at 814, Petition at 8a-9a. *See also* 821 F.2d at 815, Petition at 11a.

Also contrary to the SIA's claim, Petition at 10, the court below did not "concede" that CSC's proposed activity falls within the "literal meaning" of the term "public sale" in Section 20. The only "meaning" of the term "public sale" to which the court below referred is the meaning fixed by the Court in *Schwab*. Indeed, the court observed that the "SIA has not raised a serious challenge to the Board's finding that CSC's

proposed activities do not fall within the literal meaning of 'public sale' *as interpreted by the Court in Schwab*." 821 F.2d at 815, Petition at 11a (emphasis supplied). The only other meaning of "public sale" to which the SIA referred the court below is set forth in the *American Heritage Dictionary*, which the court below properly rejected in light of *Schwab*'s admonition that the term "public sale" be read in conjunction with the underwriting activities surrounding it in the Act. *See* 821 F.2d at 815, Petition at 11a.

The SIA's only attempt to argue that the combination of securities execution services and investment advice creates an impermissible "salesman's stake" on the part of CSC and therefore transforms these separately permissible activities into the "public sale" of securities within the meaning of Section 20, *see* Petition at 12, is a straw-man predicated entirely upon the SIA's own repeated mischaracterizations of CSC's proposed activity. The SIA's contentions were thus properly rejected by both the Board and the court below. As noted above, both before the Board and the court below and throughout its petition, the SIA has contended that CSC will actively promote trades in particular securities and will generate profits based upon its success in convincing customers to purchase or sell those particular securities. *See supra* pp. 2-3 and n. 2. As also noted above, these statements are simply untrue. As the court below found:

> CSC will not have any financial interest in the sale of a particular security. CSC will have no relationship with any issuer and will receive a commission on any sale or purchase it executes for a customer. If CSC advises a customer to buy Company X's securities but the customer would prefer to buy Company Z's securities, then CSC clearly would not have an incentive to sell Company X's securities. CSC would be indifferent because it would receive its brokerage fee either way. Thus, CSC's financial incentive relates solely to the *number* of shares it trades and not to any particular security. Further, as noted by NatWest, since CSC will in reality recommend only a

> small percentage of securities traded, "CSC can hope to operate profitably only if the vast majority of transactions that it brokers involve securities as to which it has made no investment recommendation at all." . . . Thus, SIA's argument that CSC will have the ability "to influence in *which* securities the customers will trade with a prospect of increased income as a result," . . . is incorrect.

821 F.2d at 817, Petition at 14a-15a (citations omitted). Accordingly, here, as much as in *Schwab*, the bank affiliate's "profits depend solely on the volume of shares it trades and not on the purchase or sale of particular securities. Thus, [the bank holding company] has no 'salesman's stake' in the securities [its subsidiary] trades." *Schwab*, 468 U.S. at 220.

Once stripped of its false premise, the SIA's argument that the addition of investment advice to securities execution services transforms CSC's proposed activity into the "public sale" of securities is reduced to mere rhetoric. As the court below stated, "[t]he critical attributes of underwriters, as defined in *Schwab*, are that they either purchase securities from the issuer or act as the agent of the issuer. 468 U.S. at 217-18. The provision of investment advice does not alter the fact that CSC will not engage in either of these activities." 821 F.2d at 814, Petition at 9a-10a.[9]

2. In light of the foregoing, it is also clear that neither the Board nor the court below failed to consider fully the question whether the union of investment advice and execution services in a single entity constituted the "public sale" of securities. The Board and the court below did not, as was condemned by the Court in *Investment Company Institute v. Camp*, 401 U.S. 617, 624 (1971) ("*ICI I*"), blindly assume that because each of

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9 As the court below also emphasized, the interpretation of Section 20 upon which the Board relied is also consistent with the Court's decision in *ICI II* and the traditional practices of bank trust departments when they act as investment fund managers, trustees and agents, activities that have never been thought to raise Glass-Steagall concerns. *See* 821 F.2d at 814-15, Petition at 10a-11a.

these activities has been upheld in isolation, they must also be permissible in combination. The SIA asks the Court to ignore the careful analysis of the combined, cumulative nature of CSC's then-proposed activity performed by the Board and the court below and offers instead a parade of horribles in the form of other activities in which banks could conceivably engage individually but which, if combined under one roof, might constitute the "public sale" of securities. *See* Petition at 12. The simple fact remains, however, that the SIA has not shown and cannot show that there is anything at all about CSC's proposed activity that may be characterized as constituting the type of underwriting activity which the Court has held the Glass-Steagall Act was designed to eliminate, or that the "hazards" inhering in the activities complained of do not inhere in the provision of investment advice alone. *See* 72 Fed. Res. Bull. at 594-95, Petition at 49a. Indeed, the Court in *ICI II* went so far as to contemplate specifically that banks and bank affiliates can *manage* customer funds, not merely advise on them, without raising Glass-Steagall concerns. 450 U.S. at 55. *See* 821 F.2d at 815, Petition at 10a.

3. The court below also fully considered and correctly decided in accordance with the Court's prior rulings the question whether CSC's proposed activity will give rise to the "subtle hazards" at which Glass-Steagall was aimed. As an initial matter, the court below noted that, because *ICI I* and *Schwab* suggest that the subtle hazards with which Glass-Steagall is concerned arise when a bank or bank affiliate will "hold and sell particular investments . . .", *see ICI I*, 401 U.S. at 630, or "purchase and sell [securities] on [its] own account . . .", *see Schwab*, 468 U.S. at 220 n. 23, and CSC will do neither of these things, no discussion of "subtle hazards" is necessary here at all. *See* 821 F.2d at 816-17, Petition at 14a-15a.

Nonetheless, both the Board and the court below engaged in full-scale "subtle hazards" analysis and found that none of CSC's activities is likely to result in any serious adverse effects. The Board found that all of the "subtle hazards" identified by the SIA arise from the provision of investment advice alone,

which the Court has already upheld in *ICI II*, and were largely predicated upon the SIA's false premise that CSC will have a pecuniary interest in the sale of particular securities. *See* 72 Fed. Res. Bull. at 594-95, Petition at 49a-51a. As the court below emphasized, "the Board's conclusion that these hazards are not likely to develop given the realities of the brokerage industry and the commitments made by NatWest" are, under the Court's precedents, entitled to substantial deference. *See* 821 F.2d at 818, Petition at 6a-7a. Moreover, the existence of Glass-Steagall "hazards" has always been determined by the Court with an eye to realism, not to inconceivable hypothetical concerns.

The Board and the court below also each completely and correctly addressed the specific alleged "subtle hazard" identified by the SIA in its petition relating to possible recommendations by CSC of securities originally underwritten or distributed by County Bank Limited ("CBL") (now known as NatWest Investment Bank Limited), NatWest's overseas merchant bank affiliate. *See* Petition at 13-14. The Board addressed this issue in its analysis under the BHC Act and concluded that any adverse effect from NatWest's merchant banking activities was remote, particularly in light of NatWest's express commitments that the operations of its overseas affiliates will be limited to transactions that do not constitute dealing in securities in the United States and that, in any transaction by CSC in which a NatWest affiliate is a counterparty, CSC will disclose that fact to its customer and obtain the customer's specific consent for the transaction. *See* 72 Fed. Res. Bull. at 590 n. 25, Petition at 37a n. 25. The court below added that this risk is precluded as a basis for the rejection of NatWest's application by the Court's analysis in *ICI II*, since it exists whenever a bank holding company with an overseas merchant bank affiliate renders investment advice. The court also found that the SIA's real challenge is to the Board's determination in Regulation K, 12 C.F.R. §§ 211.5(a)(13) (U.S. banks may be affiliated with entities which engage in underwriting, distributing and dealing in debt

and equity securities) and 211.23(f)(1) (foreign banks may engage in any activity outside of the United States)—a long-standing determination made pursuant to specific statutory authority set forth in Sections 2(h), 4(c)(9) and 4(c)(13) of the BHC Act, 12 U.S.C. §§ 1841(h) and 1843(c)(9) and (13)—that a bank may be affiliated with an entity that engages in the sale of securities outside the United States. Under the SIA's theory, NatWest's affiliation with CBL would itself be a violation of Section 20, which is, of course, an absurd result. *See* 821 F.2d at 819 n. 9, Petition at 18a n. 9. The misdirected nature of the SIA's concern is emphasized by the fact that it did not even raise this issue in its submissions to the Board with respect to the Glass-Steagall Act.

4. Finally, there is simply no basis for the SIA's charge that the Board's order followed the type of regulatory approach to the Glass-Steagall Act that the Court has rejected in *Securities Industry Association v. Board of Governors*, 468 U.S. 137, 137 (1984) ("*Bankers Trust*"). As the court below noted, the SIA's argument in this regard overstates the Court's rulings in *Bankers Trust* and the nature of the Board's order here. The Board has not, as the Court found it did in *Bankers Trust*, attempted to save by continuing regulatory oversight a proposed activity that falls within the literal prohibitory language of the Glass-Steagall Act. Rather, the Board has determined that CSC's proposed activities do *not* fall within the literal language of the Act and has "impos[ed] restrictions designed to assure that the activity is insulated from that associated with investment banking." 72 Fed. Res. Bull. at 595, Petition at 51a. *See* 821 F.2d at 818-19, Petition at 17a-18a. The Court has expressly approved this practice. *See ICI II*, 450 U.S. at 62, 66-67 n. 39.

Moreover, the Court has not required that the potential for the "subtle hazards" that the Glass-Steagall Act was enacted to prevent be eliminated in order for a proposed activity to pass muster. *See ICI II*, 450 U.S. at 67 n. 39 (bank affiliate may provide investment advice even though possible loss in public

confidence in the bank "cannot be completely obliterated"). Accordingly, the SIA's condemnation of the Board's analysis is without merit.

CONCLUSION

The Board's order and the decision below follow faithfully the Court's prior decisions concerning the scope of the Glass-Steagall Act and do not significantly expand the scope of the securities-related activities in which bank affiliates have historically been permitted to engage. Accordingly, there is no basis for the issuance of a Writ of Certiorari, and the SIA's petition should be denied.

Dated: December 7, 1987

Respectfully submitted,

Richard F. Ziegler
Counsel of Record
Robert L. Tortoriello
Lawrence B. Friedman
Roger M. Klein
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004
(212) 344-0600

Attorneys for Intervenors-Respondents National Westminster Bank PLC and NatWest Holdings, Inc.